[2012] JMSC Civ. 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 CD 00083 & CD 00085

BETWEEN	**CROSSINGS CONSTRUCTION LIMITED**	**CLAIMANT**
A N D	**R.A. MURRAY INTERNATIONAL LIMITED**	**DEFENDANT**

Mr. Jerome Spencer instructed by Patterson Mair Hamilton for 1st Defendant.

Mr. D. Scharschmidt Q.C. and Mr. John Ross instructed by JRR for Claimant.

Mr. John G. Graham instructed by John Graham & Co. for 2nd Defendant.

Heard: 19th and 21st March, 2012

WHETHER ADJUDICATION PROCESS SAME AS ARBITRATION

SINCLAIR-HAYNES, J

[1] This is an application by the defendant, *inter alia* to strike out the claimant's Amended Fixed Date Claim and for a declaration that the court should decline to exercise its jurisdiction to try the matter. The ground on which the declaration is sought is that the dispute was referred to adjudication in the first instance and not to arbitration and consequently the court has no jurisdiction to hear the matter, it not being governed by the Arbitration Act.

RELEVANT BACKGROUND

[2] The issue for my determination at this juncture is whether the court should decline to exercise its jurisdiction to try the matter. The court will therefore confine itself

to facts which relate to that issue. By agreement dated 18th day of August 2010, between Crossings Construction Ltd (the claimant) and R.A. Murray (the defendant) Mr. Brian Goldson was appointed sole Adjudicator. It was a term of the said agreement that Mr. Goldson should publish his award within six weeks of the hearing. The hearing concluded on the 20th September 2011. The Adjudicator failed to publish his award within the time stipulated.

[3] The claimant sought the defendant's permission to enlarge the time required to publish his findings. The defendant refused to give its consent and instead served notice of dissatisfaction. Consequent on the defendant's refusal to consent, the claimant applied to the court pursuant to Section 10 of the Arbitration Act 1900 and Part 71. 3. (1) and (n) of the Civil Procedure Rules for the following order, *interalia:*

> *"An order that the time for the Second Defendant to make and publish his award under the reference to Arbitration pursuant to the agreements in writing dated September 29, 2008 in case of the Angels River Adjudication and the agreement in writing dated November 22 2007 in the case of the Johnson River Adjudication as well as the agreement between the claimant and the First Defendant dated August 18 2010 between the Claimant and the first Defendant in respect of both matters be further enlarged on the grounds that the Second Defendant failed to make and deliver his ruling within the time specified in the said agreement."*

THE CLAIMANT'S SUBMISSION

[4] Donald Scharschmidt QC submits on behalf of the Claimant that section 10 of the Arbitration Act authorizes the application because the subject matter of the adjudication is governed by the Arbitration Act. He submits that in 1900 when the Arbitration Act was promulgated, the"adjudication"procedure was not contemplated; hence there is no reference to it in the Act Adjudication was simply a judgment of a judge or arbitrator, and a judge was defined as a judge or arbitrator. According to him, Adjudication and Arbitration are similar processes.

[5] Arbitration, he submits, is not defined by the Act. The meaning of the word is to be ascertained from recognized dictionaries. He relies on the statement made by Lord Coleridge CJ in **R v Peters** (1886) QBD Vol. xvl, 636. At page 641:

> "*I am quite aware that dictionaries are not to be taken as authoritative exponents of the meaning of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense and we are therefore sent for instruction to these books.*"

He also relies on the statement of the learned author of **Maxwell on – The Interpretation of Statutes –** 10th Edition. At page 32:

> *"In the absence of judicial guidance or authority…dictionaries can be consulted."*

[6] It is the submission of Learned Queen's Counsel that at the time the Act was passed, Arbitration was understood to mean the submission of a dispute to a person or persons who would conduct an enquiry in a judicial manner, hearing witnesses for the parties involved and deciding thereon. That definition, he submits, is obtained from the text, "**Words and Phrases Legally Defined"**, 2nd Edition under the General Editorship of John B Sunders at page 107, which states:

> *"A reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction… If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration."*

[7] He also relies on the observations of Lord Esher in **Re Carus –Wilson and Green** (1887) QBD 530 at pages 530 to531:

> *"if it appears from the terms of the agreement, by which a matter is submitted to any person that that which he is to do is in the nature of a judicial enquiry, and that the object is that we should hear the parties and*

decide the nature on evidence to be laid before him, there the person is an arbitrator"

THE DEFENDANT'S SUBMISSION

[8] The defendant submits that adjudication is not arbitration. The relevant disputes were referred to adjudication in the first instance, not arbitration. Section 10 of the Arbitration Act is therefore not applicable. In the absence of any provision in the contract between the parties or otherwise, to enlarge time to allow the Adjudicator to hand down his decision, the claimant is precluded from making such an application. He relies on Part 15 of the contract which speaks to the resolution of disputes; the contents of correspondence which were exchanged between the parties and the case of **A Cameron Ltd v John Mowlem and Company Ltd plc** [1991] 52 Building Law Reports 24.

RULING

IS ADJUDICATION A SYNONYM FOR ARBITRATION?

[9] Section 10 of the Arbitration Act allows the court to enlarge time for an Arbitrator to make an award.

Section 10 of the Arbitration Act provides:

> *"The time for making an award may from time to time be enlarged by order of the court or a judge, whether the time for making the award has expired or not."*

The pertinent question is whether the word adjudication, is merely a synonym for arbitration? If the answer is in the affirmative, the claimant is authorized to apply to the court pursuant to section 10 of the Arbitration Act and the court is clothed with the requisite jurisdiction to entertain the matter. If the answer is in the negative, in the absence of any contractual, statutory or common law basis the court lacks the authority to grant the application.

[10] An examination of the clauses in the agreement which deal with the matter is illuminating. The parties by virtue of agreement dated 18th April 2010 agreed that the matter should be the subject of adjudication. Clause 5 reads:

> *"5.1 ADJUDICATION*
> *Unless settled amicably, any dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any valuation or other decision of the Employer, shall be referred by their Party to adjudication in accordance with the attached Rules for adjudication ("the Rules"). The adjudicator shall be any person agreed by the Parties. In the event of disagreement, the adjudicator shall be appointed in accordance with the Rules.*
>
> *15.2 NOTICE OF ADJUDICATION*
> *If a party is dissatisfied with the decision of the adjudication, or if no decision is given within the time set out in the Rules, the Party may give notice of dissatisfaction referring to this sub-section within 28 days of receipt of the decision or the expiry of the time for this decision. If no notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the parties. If notice of dissatisfaction is given within the specified time, the decision shall be binding on the parties who shall give effect to without delay unless and until the decision of the adjudicator is revised by an arbitrator.*
>
> *15.3 ARBITRATION*
> *A dispute which has been the subject of a notice of dissatisfaction shall be finally settled by a single arbitrator under the rules specified in the Appendix. In the absence of agreement, the arbitrator shall be designed by the appointing specified in the Appendix. Any hearing shall be held at the place specified in the Appendix and the language referred to in Sub-Clause 1.5."*

[11] It is manifest from the above agreement that the parties intended, in the absence of an amicable resolution, two separate processes: adjudication and arbitration. It is beyond dispute that they recognized a distinction between the processes. The intention

was that the Arbitrator had the power to set aside the award of the Adjudicator and that the decision of the Arbitration would be final and binding. **By way of letter** dated May 22, 2010 Mr. Trevor Patterson of Patterson Mair Hamilton, Attorneys-at-Law for the Defendant said:

> *"As I indicated to you in the course of our telephone conversation, I would prefer we not depart from the relevant contract. Thus, where a contract calls for a dispute to be referred to adjudication, I do think that we should stick with the process even when there is a right of appeal to an arbitrator.*"

In a further letter dated April 28, 2010, he stated:

> *"I do recall saying to you that my client is not amenable to your proposal that all three contracts be subject to arbitration. For the avoidance of doubt, I confirm that my client is insisting that we must follow the dispute resolution process in the contracts. Accordingly, Angels River and Johnson River should be dealt with by adjudication*"

Again on the June 17, 2010, Mr. Patterson wrote:

> "*In relation to Angel's River and Johnson River, I have prepared a separate Adjudication Agreement. As you can see, it incorporates practically all the terms you provided for in the Arbitration Agreement but it also includes, as an Appendix, the adjudication procedure because unlike the arbitration where the procedures are backed up by the Arbitration Act, that is not so in the case of the adjudication."*

[12] The Question however remains to be resolved; is adjudication essentially arbitration? Is the process governed by the Arbitration Act?

[13] The English Arbitration Act, like ours, does not define arbitration. The learned authors of **Commercial Arbitration** Second Edition**, Mustill and Boyd** defined arbitration thus;

"Arbitration is a process which is carried out pursuant to an agreement to arbitrate. If the agreement is not to arbitrate, but to do something else the resulting process cannot be an arbitration, however, many of the characteristics of an arbitration it may appear to possess, unless the parties can be said by their conduct to have made a consensual variation of the original contract. The converse is also true."

[14] In the said text at page 38 the learned authors' stated:

"*It may be of great practical importance to know whether an agreement to have a particular question investigated or decided by a tribunal chosen by consent or by an agreed method is an agreement to arbitrate, or something else; and whether a process which is in the course of reaching, or has reached a decision is or is not an arbitration. Unfortunately, English law does not provide a comprehensive answer to the question, "What, is an arbitration?" There is no code of arbitration law, of which article 1 would contain an exclusive definition of the arbitral process; the Arbitration Acts contain a patchwork of individual provisions, introduced over the years to buttress a system, the general nature of which is taken for granted……there is no statute which defines "arbitrate", "arbitrator" or "arbitration"*

[15] At page 41 they outline the attributes which are required for a process to be regarded as an arbitration.

"Attributes which must be present

i. The agreement pursuant to which the process is, or is to be, carried on ("the procedural agreement") must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties to the procedural agreement.

ii. The procedural agreement must contemplate that the process will be carried on between those persons whose substantive rights are determined by the tribunal.

iii. *The jurisdiction of the tribunal to carry on the process and to decide the rights of the parties must derive either from the consent of the parties, or from an order of the court or from a statute the terms of which make it clear that the process is to be an arbitration.*

iv. *The tribunal must be chosen, either by the parties, or by a method to which they have consented.*

v. *The procedural agreement must contemplate that the tribunal will determine the rights of the parties in an impartial manner, with the tribunal owing an equal obligation of fairness towards both sides.*

vi. *The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.*

vii. *The procedural agreement must contemplate a process whereby the tribunal will make a decision upon a dispute which is already formulated at the time when the tribunal is appointed.*

Other factors which are relevant

i. *Whether the procedural agreement contemplates that the tribunal will receive evidence and contentions, or at least give the parties the opportunity to put them forward.*

ii. *Whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration.*

iii. *Whether the identity of the chosen tribunal, or the method prescribed for choosing the tribunal, shows that the process was intended to be an arbitration.*

iv. *Whether the procedural agreement requires the tribunal to decide dispute according to the law."*

[16] The English Court of Appeal case of **A Cameron Ltd v John Mowlem and Company plc** [1991] Building Law Report 24 clarifies the law and provides guidance. In that case an adjudicator who was duly appointed in accordance with the provisions of a sub–contract, ordered the payment of a certain sum to the claimant. The defendant paid only a part of the sum that was ordered. The claimant sought to enforce the

adjudicator's award by issuing a summons under section 26 of the Arbitration Act, 1950.The contract between the parties stated that the Adjudicator's decision was binding until the matters upon which the decision was based had been settled by agreement or determined by an arbitrator or the court. Interestingly, the instant case contains a similar clause.

[17] It was argued on behalf of the Claimant that the judge was wrong and that the adjudication process qualified as arbitration. Counsel for the claimant, in support of his claim referred to the list of factors in **Mustill and Boyd, Commercial Arbitration** (cited above). He considered that the said list of factors was material in determining whether a procedure qualified as arbitration.

[18] The Court of Appeal however held that a decision of an Adjudicator was binding only until the determination by an Arbitrator on the disputed claim. It was not an award on an arbitration agreement within the meaning of section 26 of the Arbitration Act 1950 and/hence it could not be enforced summarily under that section.
Mann LJ at page 38, said:

> *"Undoubtedly some at least of those factors are present in the adjudication process but rather than proceeding by reference to a list we prefer to focus upon the sub-contract. That does contain an undoubted arbitration provision (Article 3) and it is by an arbitrator appointed under that article that a dispute as to set-off is to be ultimately resolved whatever an adjudicator may decide (see clauses 24.1.1.1 and 24.3.1). An adjudicator's decision is "binding until" determination by an arbitrator. The decision has an ephemeral and subordinate character which in our view makes it impossible for the decision to be described as an award on an arbitration agreement. The structure of the sub-contract is against that conclusion. We would dismiss this appeal."*

[19] In light of the eminently reasonable and highly persuasive decision of the English Court of Appeal, this court holds that adjudication is not governed by the Arbitration Act.

There is therefore no statutory, common law or contractual basis to establish jurisdiction. Consequently, this court declines to exercise its jurisdiction to try the claim.

[20] The claim is therefore struck out.

[21] Costs pursuant to the CPR for 2 days to be borne by the claimant and second defendant.

[22] Leave to appeal the issue of cost.